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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA—WESTERN DIVISION

HUMBERTO DANIEL KLEE and
DAVID WALLAK, individually, and
on behalf of a class of similarly
situated individuals,

Plaintiffs,

v.

NISSAN NORTH AMERICA, INC.,
Defendant.

Case No.: CV12-08238 DDP (PJWx)

**FIRST AMENDED CLASS ACTION
COMPLAINT FOR:**

- (1) Violations of California Consumer Legal Remedies Act
- (2) Violations of Unfair Business Practices Act
- (3) Breach of Implied Warranty pursuant to Song-Beverly Consumer Warranty Act
- (4) Breach of Implied Warranty pursuant to Magnuson-Moss Warranty Act
- (4) Breach of Implied Warranty of Merchantability
- (5) Negligent Misrepresentation
- (6) Violation of the Arizona Consumer Fraud Act

**Jury Trial Demanded As to All Claims
So Triable**

INTRODUCTION

1. The Nissan Leaf is an electric car marketed, distributed, sold, warranted and serviced by Nissan North America, Inc. (“NNA” or “Nissan”). As further alleged below, Defendant made materially misleading representations and omissions regarding the Leaf’s battery capacity and driving range. Defendant also failed to disclose and/or intentionally omitted to reveal a uniform design defect in the Leaf’s battery system that causes all Nissan Leaf Class Vehicles to prematurely lose battery life and driving range.

2. To remedy Defendant’s misconduct, Plaintiff Humberto Daniel Klee brings this action for injunctive relief, pursuant to California’s consumer protection statutes, on behalf of himself and all current owners or lessees in the United States of 2011-2012 Nissan Leaf vehicles (collectively, “Class Vehicles”). Plaintiff Klee seeks an order, *inter alia*, (1) enjoining Nissan from using misleading information in connection with selling the Leaf; (2) compelling Nissan to issue corrective disclosures to Leaf owners and lessees; (3) compelling Nissan to remove and replace Plaintiffs and Class Members’ battery systems with a suitable alternative product; (4) compelling Nissan to provide class members with a new battery for the Leaf that does not contain the defects alleged herein; and/or (5) compelling Nissan to reform its Leaf battery warranty, in a manner deemed to be appropriate by the Court, to cover the loss of battery capacity under warranty as alleged herein and to notify all class members that such warranty has been reformed.

3. Plaintiff David Wallak brings this action for damages, pursuant to Arizona law, on behalf of himself and all current and former owners or lessees in Arizona of 2011-2012 Nissan Leaf vehicles.

4. The Nissan Leaf is an electric vehicle propelled by an electric motor and powered by a rechargeable lithium ion (“Li-ion”) battery pack. Instead of

1 adding gasoline or diesel fuel to a gas tank, Nissan Leaf owners charge their
2 vehicles at charging stations or using at-home chargers.

3 5. Whereas owners of typical gasoline vehicles can expect a range of
4 around 300 miles per tank, Nissan advertises the Leaf's range at 100 miles or
5 less, depending on "a number of variables, including road conditions and the
6 weather."

7 6. Nissan's advertised driving range was a material, and perhaps the
8 most important, factor for Plaintiffs and Class Members who purchased a Nissan
9 Leaf. Consumers who use their Nissan Leaf for daily commutes must, as a
10 practical matter, charge their vehicles on a daily basis, a process that can take
11 approximately seven (7) hours for a full charge. Any reduction in vehicle range
12 can have a substantial impact on the vehicle's viability as a practical mode of
13 transportation.

14 7. As further alleged herein, Nissan's representations regarding the
15 Leaf's driving range were misleading. Unbeknownst to purchasers, the
16 advertised driving range is based on the vehicle's performance only after fully
17 charging the battery to 100% capacity. In fact, however, charging the battery to
18 100% causes battery damage, and Nissan expressly recommends that owners *not*
19 charge their vehicles to 100% in order to maximize battery life and that the
20 battery be charged to only 80% capacity.

21 8. Before purchase or lease, Nissan failed to disclose its own
22 recommendation that owners avoid charging the battery beyond 80% in order to
23 mitigate battery damage and failed to disclose that Nissan's estimated 100 mile
24 range was based on a full charge battery, which is contrary to Nissan's own
25 recommendation for battery charging. Consumers thus were misled by Nissan's
26 representations regarding driving range without being aware that these ranges
27 were only achievable by charging the battery in a manner contrary to Nissan's
28

1 own guidance.

2 9. Second, Nissan failed to disclose and/or intentionally omitted to
3 reveal a design defect in the Leaf's battery system (the "thermal management
4 defect") which is causing all Class Vehicles to suffer widespread, severe and
5 premature loss of driving range, battery capacity and battery life.

6 10. Other electric vehicles equipped with lithium ion batteries in North
7 America, including the Chevrolet Volt, the Toyota RAV4 EV, and the Ford
8 Focus Electric, are equipped with active thermal management systems. These
9 systems circulate cooling fluid throughout the battery array, actively cooling the
10 batteries.

11 11. Nissan, however, opted not to include an active thermal
12 management system in the Leaf. The lack of an adequate active cooling system
13 is a design defect that fails to adequately cool the batteries, causing the batteries
14 to suffer heat-related damage and causing premature battery capacity loss, well
15 in excess of Nissan's own guidelines.

16 12. While Nissan's owner's manual provides that the Leaf may lose
17 20% of battery capacity over *five (5) years* of operation, in fact, class members'
18 vehicles, especially those vehicles exposed to warm climates, are losing over
19 27.5% battery capacity within the first *one (1) to two (2) years of operation*.
20 This battery capacity loss results in a reduction in the vehicle's driving range.

21 13. As described below, Nissan was well aware of the active thermal
22 management defect and failed to disclose it. Moreover, Nissan exacerbated its
23 wrongful conduct, by expressly *excluding* loss of battery capacity under its
24 8 year/100, 000 mile battery warranty, even though it knew of the thermal
25 management defect and propensity of the battery to lose capacity in excess of the
26 amounts disclosed.

27 14. To remedy the wrongful conduct alleged herein as to the Nationwide
28

1 Class, as defined below, Plaintiff Klee seeks injunctive relief as provided by
2 California's consumer protection statutes. Any damages or monetary relief that
3 might be awarded with respect to the Nationwide Class is incidental to the
4 injunctive relief sought.

5 15. To remedy the wrongful conduct alleged herein as to the Arizona
6 Class, Plaintiff Wallak seeks damages pursuant to Arizona law.

7 **PARTIES**

8 16. Plaintiff Humberto Daniel Klee is a California citizen who resides in
9 Pomona, California. In June 2011, Plaintiff leased a new 2011 Nissan Leaf from
10 Nissan dealer Empire Nissan, in Ontario, California.

11 17. Mr. Klee leased his vehicle primarily for his personal, family, or
12 household use. Nissan manufactured, sold, distributed, advertised, marketed,
13 and warranted the vehicle.

14 18. In July 2012, only thirteen (13) months into his lease, Mr. Klee's
15 battery capacity level gauge lost one bar on the vehicle's internal Battery
16 Capacity Level gauge. In September 2012, Plaintiff lost a second bar from his
17 battery capacity level gauge. A loss of two battery capacity level gauge bars
18 represents a capacity reduction of at least 21.5%.

19 19. Mr. Klee has also noticed a substantial drop in driving range since
20 the beginning of the lease.

21 20. Were Mr. Klee aware of the misrepresentations and omissions
22 described herein, he would not have leased his vehicle as further alleged herein.

23 21. At all times, Mr. Klee, like all Class Members, drove his vehicle in a
24 foreseeable manner and in the manner in which it was intended to be used.

25 22. Plaintiff David Wallak is an Arizona citizen who resides in Phoenix,
26 Arizona. In July 2012, Mr. Wallak purchased a used 2011 Nissan Leaf in
27 Tolleson, Arizona with 7,063 miles on the odometer. Mr. Wallak purchased his
28

1 vehicle primarily for his personal, family, or household use. Nissan sold,
2 distributed, advertised, marketed, and warranted the vehicle.

3 23. At the time of purchase, Mr. Wallak's vehicle had 11 out of 12
4 capacity bars remaining on his battery capacity level gauge.

5 24. Within two (2) weeks of purchase, two (2) bars disappeared from
6 Mr. Wallak's battery capacity level gauge, bringing his vehicle's loss of capacity
7 level bars to three (3) total. A loss of three bars represents a battery capacity
8 reduction of at least 27.5%.

9 25. Were Mr. Wallak aware of the misrepresentations and omissions
10 described herein, he would not have purchased his vehicle as further alleged
11 herein.

12 26. At all times, Mr. Wallak, like all Class Members, drove his vehicle
13 in a foreseeable manner and in the manner in which it was intended to be used.

14 27. Defendant Nissan North America, Inc. is an automobile distribution,
15 and/or servicing corporation doing business in all 50 states. Defendant
16 distributes, markets, services, repairs, sells and leases passenger vehicles,
17 including the Class Vehicles, nationwide.

18 28. Defendant, Nissan North America Inc., is a corporation organized
19 and in existence under the laws of the State of California and registered with the
20 California Department of Corporations to conduct business in California.
21 NNA's Corporate Headquarters were located at Gardena, California until on or
22 about 2007 when NNA moved its Corporate Headquarters to Franklin,
23 Tennessee. Nissan North America, Inc. is the distributor and warrantor of the
24 Class Vehicles in the United States.

25 29. At all relevant times, Defendant was engaged in the business of
26 marketing, distributing, and selling automobiles and other motor vehicles and
27 motor vehicle components in Los Angeles County and throughout the United
28

1 States of America.

2 **JURISDICTION**

3 30. This is a class action.

4 31. Some members of the Proposed Class are citizens of states different
5 from the home state of Defendant.

6 32. On information and belief, the value of Class Members' aggregate
7 claims exceeds \$5,000,000.00, exclusive of interest and costs.

8 33. Jurisdiction is proper in this Court pursuant to 28 U.S.C. § 1332(d).

9 **VENUE**

10 34. Nissan, through its business of distributing, selling, and leasing the
11 Class Vehicles, has established sufficient contacts in this district such that
12 personal jurisdiction is appropriate. Defendant is deemed to reside in this district
13 pursuant to 28 U.S.C. § 1391(a).

14 35. In addition, a substantial part of the events or omissions giving rise
15 to these claims and a substantial part of the property that is the subject of this
16 action are in this district. In addition, Plaintiff's Declaration, as required under
17 California Civil Code section 1780(d) but not pursuant to *Erie* and federal
18 procedural rules, which reflects that a substantial part of the events or omissions
19 giving rise to the claims alleged herein occurred, or a substantial part of property
20 that is the subject of this action, is situated in Los Angeles County, California, is
21 attached as Exhibit 1.

22 36. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(a).

23 **FACTUAL ALLEGATIONS**

24 **Battery Capacity Loss**

25 37. Nissan distributed, sold, and leased the Class Vehicles. Nissan sold
26 thousands of Class Vehicles in California and Nationwide, directly or indirectly,
27 through dealers and other retail outlets.
28

1 38. In 2010, Nissan brought the Class Vehicles to the market and
2 repeatedly and consistently advertised an “up to 100 mile” driving range for the
3 Nissan Leaf.

4 39. Nissan’s advertised driving range is based on the vehicle’s
5 performance after fully charging the battery to 100% capacity. However, Nissan
6 misrepresented and failed to disclose to Class Members prior to purchase that
7 Nissan’s estimated 100-mile range is based on a *full* charge; that Nissan itself
8 recommended that vehicle owners *not* charge their batteries to 100%; that
9 owners should charge their Leaf vehicles to only 80% battery capacity to prevent
10 damage to the battery and maximize the battery’s longevity and maintain its
11 capacity; and that charging to 100% capacity can cause battery damage. As
12 Nissan’s own Leaf owner’s manual admits: “To extend the life span of the Li-
13 ion battery, use long life mode by selecting [80% Charge (Improves Battery
14 Longevity)].”

15 40. Further, Nissan knew and failed to disclose that the Leaf suffers
16 from a defect in the Leaf’s battery system that causes all of the vehicles to lose
17 battery capacity materially in excess of Nissan’s described range.

18 41. Lithium ion batteries experience a reduction in the amount of
19 electricity or charge they can hold over time. This battery capacity loss results in
20 a reduction in the vehicle’s driving range. In the Nissan Leaf owner’s manual,
21 Nissan explicitly estimates that the Leaf may lose 20% of battery capacity over
22 five (5) years of operation. Nissan recently informed consumers on Facebook,
23 “If a LEAF is treated as outlined in the Owner’s Manual, you can expect 80
24 percent of the battery capacity after 5 years.”¹

25
26 ¹ Nissan Facebook Page (August 29, 2012), [http://www.facebook.com/nissanleaf/posts/142423552561869?comment_id=282400&offset=0&total_com](http://www.facebook.com/nissanleaf/posts/142423552561869?comment_id=282400&offset=0&total_comments=29)
27 [ments=29](http://www.facebook.com/nissanleaf/posts/142423552561869?comment_id=282400&offset=0&total_comments=29)
28

42. Similarly, Mark Perry, Nissan's Director of Product Planning, stated in a 2010 interview, "We don't need thermal management for the U.S., but we are looking at the technology for Dubai and other locations like that.... **We've gone on the record saying that the pack has a 70 to 80 percent capacity after 10 years.**"²

43. However, in practice, class members especially those whose vehicles are exposed to warm climates, are finding their battery capacity reduced by 27.5% or more within the first *one (1) to two (2) years of operation*.

44. Contrary to Nissan's public representations, many Class Members' vehicles have already reached Nissan's five (5) to ten (10) year capacity loss projections *after less than two (2) years of operation*. As detailed below, scores of consumers online have already reported losses of one (1) to three (3) bars on the vehicle's internal Battery Capacity Level gauge, representing battery capacity losses of 15% to 27.5% or more.³ These losses of capacity are due to the thermal management defect.

45. Other electric vehicles equipped with lithium ion batteries in North America, including the Chevrolet Volt, the Toyota RAV4 EV, and the Ford Focus Electric, are equipped with active thermal management systems. These systems circulate cooling fluid throughout the battery array, actively cooling the batteries. Nissan, however, opted not to include an active thermal management system in the Leaf. The lack of an adequate active cooling system is a design defect that fails to adequately cool the batteries, causing the batteries to suffer heat-related damage and causing premature battery capacity loss in excess of

² Domenik Yoney, *Is the Nissan Leaf battery pack Underengineered?* (August 31, 2012) <http://green.autoblog.com/2010/01/25/is-the-nissan-leaf-battery-pack-under-engineered/>

³ My Nissan Wiki, *Compendium of battery losses* (August 28, 2012). <http://www.mynissanleaf.com>

1 Nissan's representations.

2 46. Managing battery temperature is critical to maintaining capacity in
3 lithium ion batteries. In an article posted on Nissan's website in February 2012,
4 Nissan admits that "The biggest cause of a battery's lifespan being shortened is
5 overheating."⁴

6 47. Plaintiffs and Class Members, particularly those residing in warmer
7 climates, are experiencing precipitous drops in battery capacity well in excess of
8 Nissan's stated estimates for rates of decline, due to the thermal management
9 defect.

10 48. As Nissan Leaf owners experience losses of battery capacity, they
11 also experience proportionate losses of driving range. Further, when Class
12 Members complain to Nissan's authorized dealers about the problem, they are
13 instructed to avoid charging their batteries beyond 80% of current capacity to
14 avoid further damage. Thus, Plaintiffs' and Class Members' driving ranges are
15 dropping due to both the loss of battery capacity *as well as* Nissan's prescribed
16 limitation on charging their batteries beyond 80% of current capacity.

17 49. In February 2012, in an apparent attempt to address concerns about
18 the thermal management defect, Nissan posted an article on its website stating:

19 **"A battery that can control its heating temperature**
20 **without a cooling mechanism is also longer lasting,**
21 **since the biggest cause of a battery's lifespan being**
22 **shortened is overheating. (Nissan Technology**
23 **Magazine, 017 Why did Nissan Develop an EV Battery?**
24 **(August 28, 2012), [http://www.nissan-](http://www.nissan-global.com/EN/TECHNOLOGY/MAGAZINE/ev_battery.html)**
25 **global.com/EN/TECHNOLOGY/MAGAZINE/ev_batte**
26 **ry.html) (emphasis added).**

27 50. In 2010, Wired magazine reported that, according to Nissan product

28 ⁴ Nissan Technology Magazine, 017 Why did Nissan Develop an EV
Battery? (August 28, 2012), http://www.nissan-global.com/EN/TECHNOLOGY/MAGAZINE/ev_battery.html.

1 planner Paul Hawson, Nissan decided to omit an active thermal management
2 system in order to save room in the car's interior:

3 Asked why Nissan chose not to use active thermal
4 management, Hawson explained the engineers
5 experimented with it but found it required a central
6 tunnel on top of the pack. That would intrude on cabin
7 space, splitting the rear bench into two seats with a
8 hump in the middle. Nissan, he said, decided to use
9 only passive cooling to preserve passenger space.
10 (Darryl Siry, *In Race to Market, Nissan's Electric Car
11 Takes Shortcuts* (August 31, 2012),
12 <http://www.wired.com/autopia/2010/01/nissan-leaf-2/>))

13 51. Plaintiffs are informed and believe and based thereon allege that
14 Defendant knew or should have known that the Class Vehicles are defective and
15 not fit for their intended purpose of providing consumers with safe and reliable
16 transportation. Nevertheless, Defendant has actively concealed and failed to
17 disclose this defect from Plaintiffs and the Class Members at the time of
18 purchase or lease and thereafter.

19 52. Since 2010, if not before, Nissan knew that the Class Vehicles and
20 their battery systems were defectively designed. Rather than alerting Class
21 Members and offering to repair the Class Vehicles, Nissan has concealed this
22 problem from its customers at the time of purchase or lease and thereafter.

23 53. Defendant knew of and concealed the thermal management defect
24 that is present in every Class Vehicle, along with the attendant lack of warranty
25 coverage and associated repair costs, from Plaintiffs and Class Members, at the
26 time of sale, lease, and repair and thereafter. The existence of the thermal
27 management defect is a fact that a reasonable consumer would consider material
28 when deciding whether to purchase or lease an electric vehicle with an
advertised range of 100 miles per charge or less.

54. Reasonable consumers, like Plaintiffs, expect and assume that an
electric vehicle will achieve range advertised by its manufacturer, will function
in a manner that will not pose a safety hazard, and is free from defects. Plaintiffs

1 and Class Members further expect and assume that Nissan will not sell or lease
2 vehicles with known defects, such as the thermal management defect, and will
3 disclose any such defects to its consumers when it learns of them. They do not
4 expect Nissan to fail to disclose the thermal management defect to them or to
5 continually deny the defect.

6 55. As a result of their reliance on Defendant's omissions and/or
7 misrepresentations, owners and/or lessees of the Class Vehicles suffered an
8 ascertainable loss of money, property, and/or value of their Class Vehicles.

9 56. As a result of the thermal management defect, Plaintiffs and the
10 Class Members were harmed and suffered actual damages. Had Plaintiffs and
11 other Class Members known of the thermal management defect, they would not
12 have purchased or leased the Class Vehicles or would have paid less for them.
13 Further, Plaintiffs and the Class Members were harmed in that the Class Vehicles
14 suffer unexpected battery deterioration damage and resultant premature loss of
15 battery and diminution in value.

16 **Nissan's Knowledge of the Thermal Management Defect**

17 57. Dating back to 2010, if not before, Nissan was aware of the thermal
18 management defect. Nissan, however, failed and refused to disclose this known
19 defect to consumers. As a result of this failure, Plaintiffs and Class Members
20 have been damaged.

21 58. For example, in 2009, before the Leaf was released, Elon Musk,
22 CEO of Tesla Motors, described the Leaf's thermal management system as
23 "primitive," due to its failure to actively cool the batteries. Musk predicted that
24 due to Nissan's failure to include an active thermal management system in the
25 Leaf, its battery would experience temperatures "all over the place," causing it to
26 suffer "huge degradation" in cold environments and to basically "shut off" in hot
27 environments.
28

1 59. Nissan also has a long history of studying lithium ion electric
 2 batteries and is thus well versed in their chemical properties, limits, and
 3 tolerances. According to a 2012 Nissan PowerPoint presentation entitled “EV /
 4 HEV Safety,” Nissan has been studying batteries for electric vehicles since 1992:
 5 “We started Lithium battery research in 1992,
 6 beginning with a cobalt type battery in a cylindrical cell
 7 package. In the late 90’s, we started developing a
 8 [Manganese]-type cell and in the early 2000’s
 9 developed a laminated cell. This led to the current cell
 10 configuration.”

11 60. In 2010, battery expert Menahem Anderman was quoted in an
 12 Automotive Engineering Online article expressing skepticism over the Leaf
 13 battery and the thermal management defect herein alleged:

14 Without proper cooling technology, “a pouch cell
 15 design with a manganese chemistry will perform very
 16 poorly” in hot climates, said Anderman of the Leaf
 17 battery. “Can you expect 10 years from the battery?
 18 Definitely not in Phoenix, I’m pretty sure not in L.A.,
 19 and I’m not sure about San Francisco and Atlanta.”
 20 (Patrick Ponticel, *Battery guru a skeptic about Leaf,*
 21 *Volt batteries* (August 29, 2012),
 22 <http://www.sae.org/mags/aei/8299>).

23 61. Nissan was contacted by Automotive Engineering online in 2010 to
 24 respond to the expert’s concerns, and was thus aware of the thermal management
 25 defect:

26 Contacted by AEI for comment, Nissan North America
 27 Manager of Technology Communications Colin Price
 28 stated: “We are confident [the cells] will dissipate heat
 well and anticipate the battery pack will have 70 to
 80% of capacity left after 10 years of automotive use.”
 (*Id.*)

62. In addition, complaints filed by consumers with the NHTSA and
 posted on the Internet demonstrate indicate Defendant’s awareness of the defect
 and that problems with the thermal management system are widespread.

63. Many purchasers and lessees of the Class Vehicles have experienced

1 problems with premature battery capacity loss. The following are some
 2 complaints relating to thermal management system failure (spelling and grammar
 3 mistakes remain as found in the original) (Safecar.gov, *Search for Complaints*
 4 (August 28, 2012), <http://www-odi.nhtsa.dot.gov/complaints/>):

NHTSA Complaints:

- 5
- 6 a. [2011 NISSAN LEAF] LOST FIRST BATTERY CAPACITY
- 7 BAR AFTER ONE YEAR OF OWNERSHIP. THIS RESULTS
- 8 IN A 15% LOSS IN CAPACITY. DIFFICULTIES ARE
- 9 OCCURRING TO ACHIEVE DRIVING DISTANCES AND
- 10 HABITS FROM THE PREVIOUS YEAR. VEHICLE WILL
- 11 SOON NO LONGER FUNCTION AS AN FORM OF
- 12 TRANSPORTATION IF RANGE CONTINUES TO DIMINISH.
- 13 THE CAPACITY LOSS SEEMS TO BE A DEFECT IN THE
- 14 BATTERY AND IS UNACCEPTABLE TO LOOSE A LARGE
- 15 AMOUNT IN A SHORT TIME FRAME. *TR
- 16
- 17 b. 2011 NISSAN LEAF ELECTRIC VEHICLE. PURCHASED ON
- 18 8/6/2011, LOST A BATTERY CAPACITY BAR ON
- 19 06/21/2012 - 10 MONTHS, 15 DAYS AFTER PURCHASE.
- 20 THIS IS A 15% LOSS OF BATTERY CAPACITY. NISSAN
- 21 ADVERTISES AN EXPECTED 80% CAPACITY
- 22 REMAINING AFTER 5 YEARS. I TOOK THE CAR TO THE
- 23 DEALER THE NEXT DAY FOR INSPECTION AND WAS
- 24 TOLD MY BATTERY IS "NORMAL," AND SO IS THE LOST
- 25 CAPACITY. I DISAGREE AND BELIEVE THE BATTERIES
- 26 NISSAN IS USING IN THIS CAR ARE UNFIT FOR THE
- 27 HIGH TEMPERATURES IN MY LOCAL AREA OF
- 28 PHOENIX, AZ. *TR
- c. [2011 NISSAN LEAF] BATTERY CAPACITY HAS
- DECREASED OVER 15%, IN JUST 7200 MILES. PLEASE
- INVESTIGATE DEFECT IN NISSAN LEAF BATTERY.
- PLEASE HAVE NISSAN INSTITUTE RECALL FOR
- DEFECTIVE BATTERIES IN 2011/2012 NISSAN LEAF
- VEHICLES. *TR
- d. [2011 NISSAN LEAF] THE NISSAN LEAF IS A 100%
- BATTERY OPERATED VEHICLE. THERE IS A BUILT-IN
- BATTERY CAPACITY INDICATOR THAT IS DISPLAYED
- AS 12 INDICATOR BARS. EACH BAR REPRESENTS A %
- OF THE BATTERIES CAPACITY TO HOLD A CHARGE.
- NISSAN CLAIMS THAT GRADUAL CAPACITY LOSS IS
- NORMAL AND THAT DRIVER SHOULD EXPECT TO
- HAVE 80% OF THEIR CAPACITY LEFT AFTER 5 YEARS

1 AND 70% AFTER 10. I LOST MY FIRST BAR AT THE
 2 BEGINNING OF APRIL. SECOND BAR FIRST WEEK OF
 3 JUNE. AND THIRD BAR FIRST WEEK OF JULY. NISSAN
 4 HAS NOT DEFINED WHAT THESE BARS MEAN.
 5 HOWEVER, I DO NOT BELIEVE THAT THE LOSS OF
 6 THREE BARS IN 4 MONTHS AFTER OWNING THE CAR
 7 FOR A YEAR IS GRADUAL. I HAVE SENT MY CAR TO 2
 8 DIFFERENT NISSAN DEALERSHIPS AND EVEN LET
 9 NISSAN NORTH AMERICA TAKE MY CAR FOR 16 DAYS
 10 FOR TESTING. SO FAR, NISSAN HAS TOLD ME THAT
 11 EVERYTHING IS NORMAL. I BELIEVE THAT HAVING A
 12 100% BATTERY OPERATED VEHICLE MARKETING TO A
 13 MASS CUSTOMER BASE AND BEING DRIVEN ON OUR
 14 STREETS AND HIGHWAYS SHOULD HAVE A
 15 DEPENDABLE BATTERY. *TR

- 16 e. [2011 NISSAN LEAF] THE PROBLEM IS THE BATTERY,
 17 WE WERE TOLD BY NISSAN THAT THERE WOULD BE
 18 A SLOW LOSS OF CAPACITY AND UP TO 20% LOSS AT 5
 19 YEARS. THIS IS ONLY IN HOT CLIMATES LIKE
 20 ARIZONA, TX AND CA. THE CAR SHOULD HAVE HAD A
 21 BATTERY COOLING SYSTEM. *TR NOW AFTER PAY
 22 \$40,000 FOR THE CAR IN THE FIRST YEAR MY DRIVING
 23 RANGE IS DOWN SO MUCH IN MY SECOND YEAR THE
 24 CAR WILL BE WORTHLESS TO DRIVE OR SELL. *TR
- 25 f. [2011 NISSAN LEAF] MY NISSAN LEAF HAS
 26 EXPERIENCED A 1 CAPACITY BAR LOSS FOR IT'S
 27 LITHIUM-ION BATTERY, REDUCING THE AMOUNT OF
 28 AVAILABLE MILES TO DRIVE. I BELIEVE THAT THIS IS
 PREMATURE AND THAT THIS IS IN RELATION TO
 LIVING IN A HOT WEATHER CLIMATE AREA (SUMMER
 MONTHS). NISSAN HAS BEEN INFORMED BY ME OF
 THIS CONDITION. THIS IS NOT THE ONLY INSTANCE, IF
 POSSIBLE, PLEASE SEE ATTACHED SITE:
[HTTP://MYNISSANLEAF.COM/WIKI/INDEX.PHP?TITLE=REAL_WORLD_BATTERY_CAPACITY_LOSS](http://MYNISSANLEAF.COM/WIKI/INDEX.PHP?TITLE=REAL_WORLD_BATTERY_CAPACITY_LOSS). *TR

Internet Postings:

- g. I live in Phoenix. I lost my First bar at the beginning of April,
 Second bar first week of June, and Third bar First week of July. I
 still love my Leaf, but it will not get me to work 1-way in the
 next few weeks (45 miles). 2 different dealerships have told me
 this is normal Update! I got my car back today from
 Nissan's 2 week testing in Casa Grande. My Nissan Dealership
 was not able to tell me much about what was done to my car, but
 I still have 3 Battery Capacity Bars missing and the Leaf's

1 Mileage Guess-O-Meter is still reading on 48 mile estimated
 2 range on 100% charge with climate control on. I don't know
 3 when, or even if I will ever find out what was done to my car, or
 4 if Nissan has or is planning a fix. I was hoping to have better
 5 information from Nissan for this update, but alas, this is what I
 6 was given, or should I say not given. (Nissan Leaf Facebook
 7 Page, *Nissan North America on the Balancing Act* (August 29,
 8 2012), [http://www.facebook.com/nissanleaf/posts/](http://www.facebook.com/nissanleaf/posts/142423552561869)
 9 142423552561869)

- 10 h. I lost my third capacity bar on my LEAF a few days ago and
 11 thought this might be interesting information to add to your list. I
 12 lost the first bar at 3500 miles after just 3.5 month (End of June
 13 to Beginning of October - so all through summer). I lost the
 14 second at 10500 miles after 12 month (just before the yearly
 15 battery check or just at the start of the next summer). I lost my
 16 third capacity bar at Aug 14, 12000miles, Chandler, AZ, 12000
 17 miles, owned: 14 months (just after we hit 118F). I reported the
 18 first one immediately and they had the car for a cople of days and
 19 told me afterwards that this is "normal". I didn't get a case
 20 number for this, but I still have the initial email response, the
 21 battery report and the phone number of the engineer." (Nissan
 22 Leaf Facebook Page, *Nissan North America on the Balancing Act*
 23 (August 29, 2012), [http://www.facebook.com/nissanleaf/posts/](http://www.facebook.com/nissanleaf/posts/142423552561869)
 24 142423552561869)
- 25 i. Lost 3rd Bar, down to 9 bars only! (My Nissan Wiki, *Real World*
 26 *Battery Capacity Loss*(August 29, 2012),
 27 [http://www.mynissanleaf.com/wiki/index.php?title=Real_World_](http://www.mynissanleaf.com/wiki/index.php?title=Real_World_Battery_Capacity_Loss)
 28 [Battery_Capacity_Loss](http://www.mynissanleaf.com/wiki/index.php?title=Real_World_Battery_Capacity_Loss))
- 29 j. Took delivery on my Leaf in July '11. Lost first bar around Aug
 30 1st, 2012 and my second bar today (1 month and 850 miles later).
 31 I hope Nissan will get info out to Leaf owners soon. Living in
 32 Phoenix. (Nissan Leaf Facebook Page, *Nissan North America on*
 33 *the Balancing Act* (August 29, 2012),
 34 <http://www.facebook.com/nissanleaf/posts/142423552561869>)
- 35 k. I live in Oklahoma and at the concern of having a huge 38k paper
 36 weight I am not driving my leaf. We are having temps between
 37 105 - 110 for the next two weeks!!!!!! I am really irritated, I did
 38 not spend 38,000.00 for it to sit in my garage. That might not
 39 even help because my garage was 105 vesterday!!!! (Nikki
 40 Gordon- Bloomfield, *Nissan Responds to Wilting Arizona Leafs,*
 41 *Studies Lost Battery Capacity Page 2* (August 29, 2012),
 42 [http://www.greencarreports.com/news/1077971_nissan-](http://www.greencarreports.com/news/1077971_nissan-responds-to-wilting-arizonan-leafs-studies-lost-battery-capacity/page-2)
 43 [responds-to-wilting-arizonan-leafs-studies-lost-battery-](http://www.greencarreports.com/news/1077971_nissan-responds-to-wilting-arizonan-leafs-studies-lost-battery-capacity/page-2)
 44 [capacity/page-2](http://www.greencarreports.com/news/1077971_nissan-responds-to-wilting-arizonan-leafs-studies-lost-battery-capacity/page-2))

1. 26 days between losing capacity bar one and bar two. (My Nissan Wiki, *Real World Battery Capacity Loss*(August 29, 2012), http://www.mynissanleaf.com/wiki/index.php?title=Real_World_Battery_Capacity_Loss)
- m. [Lost second capacity bar] 3,446 miles from first bar loss. Estimated range: 12 bars (last summer) ~ mid 80's total range; 11 bars (early 2012 summer) ~ mid 70's range; 10 bars (end 2012 summer) ~ high 60's range..." (My Nissan Wiki, *Real World Battery Capacity Loss*(August 29, 2012), http://www.mynissanleaf.com/wiki/index.php?title=Real_World_Battery_Capacity_Loss)
- n. [Lost second capacity bar] 90% of my charging is in my garage to 80% overnight with 6 temp bars at start. Car is garaged at work and never left outside baking in the sun for any extended period of time." (My Nissan Wiki, *Real World Battery Capacity Loss*(August 29, 2012), http://www.mynissanleaf.com/wiki/index.php?title=Real_World_Battery_Capacity_Loss)

64. Nissan also had superior and exclusive knowledge of the thermal management defect, and knew or should have known that the defect was not known or reasonably discoverable by Plaintiffs and Class Members before they purchased or leased the Class Vehicles.

65. Plaintiffs are informed and believe and based thereon allege that before Plaintiffs leased and purchased their vehicles, and since 2010, if not before, Nissan knew about the thermal management defect through sources not available to consumers, including pre-release testing data, early consumer complaints about the thermal management defects to Nissan and its dealers, testing conducted in response to those complaints, high failure rates and replacement part sales data, aggregate data from Nissan dealers, technical automotive publications criticising the thermal management system in the Class Vehicles, among other internal sources of aggregate information about the problem.

66. While Nissan has been fully aware of the thermal management defect in the Class Vehicles, it actively concealed the existence and nature of the

defect from Plaintiffs and Class Members at the time of purchase, lease, service visit, and thereafter. Specifically, Nissan failed to disclose or actively concealed at and after the time of purchase, lease, or repair:

- (a) any and all known material defects or material nonconformity of the Class Vehicles, including the defects relating to the battery systems;
- (b) that the Class Vehicles, including their battery systems, were not in good in working order, were defective, and were not fit for their intended purposes; and
- (c) that the Class Vehicles and the design of their battery systems were defective, despite the fact that Nissan learned of such defects through analysis as early as 2010, and through alarming capacity decline, customer complaints, and through other internal sources, as early as 2011.

67. When consumers present the Class Vehicles to an authorized Nissan dealer complaining of premature battery capacity loss, consumers are typically told that the situation is “normal”⁵ even where the battery has lost 27.5% or more of its capacity in less than two (2) years due to the thermal management defect.

68. To this day, Nissan still has not notified Plaintiffs and the Class Members that the Class Vehicles suffer from a systemic defect that causes the batteries to prematurely lose capacity.

⁵ For example, one consumer complained online as follows: “I live in Phoenix, I lost my First bar at the beginning of April, Second bar first week of June, and Third bar First week of July. I still love my Leaf, but it will not get me to work 1-way in the next few weeks (45 miles). 2 different dealerships have told me this is normal.” (My Nissan Wiki, *Real World Battery Capacity Loss* (August 29, 2012), http://www.mynissanleaf.com/wiki/index.php?title=Real_World_Battery_Capacity_Loss).

CLASS ACTION ALLEGATIONS

69. Plaintiff Klee brings this lawsuit for injunctive relief, pursuant to Federal Rules of Civil Procedure 23(a) and 23(b)(2), on behalf of himself and all persons in the United States who purchased or leased any 2011 through 2012 Nissan Leaf vehicles, excluding fleet and government purchasers and lessees (the “Nationwide Class” or “Class”) and on behalf of a California Sub-Class defined as all Class Members in California and/or California Class Members who are “consumers” within the meaning of California Civil Code § 1761(d), excluding fleet and government purchasers and lessees (“the California Sub-Class” or “Sub-Class”).

70. To the extent that the Nationwide Class remedy involves any monetary relief, such monetary relief would be incidental to the injunctive relief sought. As the wrongs alleged apply equally and identically to all class members and flow directly from liability to the class as a whole on the claims forming the injunctive relief, no individualized facts or additional hearings would be required. Proof of purchase of the vehicle (i.e., proof of harm) entitles each class member to the same relief for the wrongs alleged. Moreover, any restitution or monetary relief would be formulaic and objectively calculable and not dependent in any significant way on subjective differences between class members.

71. Plaintiff Wallak brings this lawsuit as a class action, pursuant to Federal Rules of Civil Procedure 23(a) and 23(b)(3), on behalf of himself and all persons in Arizona who purchased or leased any 2011 through 2012 Nissan Leaf vehicles, excluding fleet and government purchasers and lessees (the “Arizona Class”).

72. Excluded from the Classes and Sub-Class are: (1) Defendant and its parent Nissan Motor Co., Ltd., any entity or division in which they have a controlling interest, and their legal representatives, officers, directors, assigns,

1 and successors; (2) the Judge to whom this case is assigned and the Judge's staff;
2 and (3) those persons who have suffered personal injuries as a result of the facts
3 alleged herein. Plaintiffs reserve the right to amend the Class and Sub-Class
4 definitions if discovery and further investigation reveal that the Class and Sub-
5 Class should be expanded or otherwise modified.

6 73. Numerosity: Although the exact number of Class Members is
7 uncertain and can only be ascertained through appropriate discovery, the number
8 is great enough such that joinder is impracticable. The disposition of the claims
9 of these Class Members in a single action will provide substantial benefits to all
10 parties and to the Court. The Class Members are readily identifiable from
11 information and records in Defendant's possession, custody, or control, as well
12 as from records kept by the California Department of Motor Vehicles and the
13 Arizona Department of Transportation.

14 74. Typicality: The claims of representative Plaintiffs are typical of the
15 claims of the Class in that the representative Plaintiffs, like all Class Members,
16 purchased and leased a Class Vehicle designed, manufactured, and distributed by
17 Nissan and containing a battery power supply that suffers from the thermal
18 management defect. The representative Plaintiffs, like all Class Members, have
19 been damaged by Defendant's misconduct in that they have purchased or leased
20 a vehicle with an undisclosed thermal management system defect that has or will
21 result in heat related damage to the battery and resulting battery capacity loss.
22 The representative Plaintiffs, like all Class Members, have also been damaged by
23 Defendant's misrepresentations and omissions with regard to vehicle range in
24 that they purchased vehicles which do not perform as advertised. Furthermore,
25 the factual bases of Nissan's misconduct are common to all Class Members and
26 represent a common thread resulting in injury to all Class Members.

27 75. Commonality: There are numerous questions of law and fact
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1 common to Plaintiffs and the Class that predominate over any question affecting
2 only individual Class Members. These common legal and factual issues include
3 the following:

- 4 (a) Whether Class Vehicles suffer from defects relating to the
5 thermal management system;
- 6 (b) Whether Defendant knows about the defects relating to the
7 battery system and, if so, how long Defendant has known of
8 the defect;
- 9 (c) Whether the defective nature of the battery system constitutes
10 a material fact;
- 11 (d) Whether Defendant had a duty to disclose the defective nature
12 of the battery system to Plaintiffs and Class Members;
- 13 (e) Whether Defendant advertised the Class Vehicles to the Class
14 throughout the United States with materially deceptive,
15 untrue, or misleading statements regarding vehicle range;
- 16 (f) Whether Defendant made materially untrue or misleading
17 statements of facts to the Class concerning the advertised
18 vehicle ranges;
- 19 (g) Whether Defendant concealed from or omitted to state
20 material facts to the Class concerning the actual vehicle
21 ranges of the Class Vehicles;
- 22 (h) Whether Defendant knew or, by the exercise of reasonable
23 care, should have known, that the materially misleading
24 statements of fact made to the Class about the vehicle ranges
25 had the capacity or tendency to confuse and mislead;
- 26 (i) Whether Plaintiff Klee and the Nationwide and/or California
27 Sub-Class Members are entitled to equitable relief, including
28

1 but not limited to a preliminary and/or permanent injunction;

2 (j) Whether Plaintiff Wallak and the other Arizona Class

3 Members are entitled to damages;

4 (k) Whether Defendant knew or reasonably should have known of
5 the defects relating to the battery system before they sold and
6 leased Class Vehicles to Class Members;

7 (l) Whether Defendant should be declared financially responsible
8 for notifying all Class Members of the problems with the
9 Class Vehicles and for the costs and expenses of repairing and
10 replacing the defective battery systems; and

11 (m) Whether Defendant breached the implied warranty of
12 merchantability pursuant to the Song-Beverly Act as to the
13 California Class.

14 76. Adequate Representation: Plaintiffs will fairly and adequately
15 protect the interests of the Class Members. Plaintiffs have retained attorneys
16 experienced in the prosecution of class actions, including consumer and product
17 defect class actions, and Plaintiffs intend to prosecute this action vigorously.

18 77. Predominance and Superiority as to the Arizona Class: A class
19 action for damages in Arizona is superior to other available methods for the fair
20 and efficient adjudication of the controversy in Arizona as the Arizona
21 Consumer Fraud Act does not provide for an injunction as statutory relief.
22 Absent a class action, most Arizona Class Members would likely find the cost of
23 litigating their claims prohibitively high and would therefore have no effective
24 remedy at law. Because of the relatively small size of the individual Class
25 Members' claims, it is likely that only a few Class Members could afford to seek
26 legal redress for Defendant's misconduct. Absent a class action, Arizona Class
27 Members will continue to incur damages, and Defendant's misconduct will
28

1 continue without remedy. Class treatment of common questions of law and fact
 2 would also be a superior method to multiple individual actions or piecemeal
 3 litigation in that class treatment will conserve the resources of the courts and the
 4 litigants, and will promote consistency and efficiency of adjudication.

5 78. 23(b) (2) as to the Class and Sub Class: Final injunctive relief or
 6 corresponding declaratory relief, as expressly provided in California under the
 7 CLRA, the UCL and the Song Beverly Consumer Warranty Act, is appropriate
 8 respecting the class as a whole because Defendant has acted or refused to act on
 9 grounds that apply generally to the Class and Sub-Class. A single injunction
 10 would provide relief to each member of the Class. Defendant's
 11 misrepresentations and wrongful conduct was identical to each class member. A
 12 determination as to the common issues under Rule 23(a) will, in one stroke,
 13 permit the fact finder to grant the injunctive relief sought. Such requested relief
 14 does not preclude resolving this matter under Rule 23(b) and the notice and opt-
 15 out provisions thereunder.

16 **FIRST CAUSE OF ACTION**

17 **(Violation of California's Consumer Legal Remedies Act,** 18 **California Civil Code § 1750, et seq.**

19 **By Plaintiff Klee On Behalf of the Class and Sub-Class)**

20 79. Plaintiffs hereby incorporate by reference the allegations contained
 21 in the preceding paragraphs of this Complaint.

22 80. Plaintiff Humberto Daniel Klee ("Klee") brings this cause of action
 23 on behalf of himself and on behalf of the members of the Class and Sub-Class.

24 81. Defendant is a "person" as defined by California Civil Code
 25 § 1761(c).

26 82. Klee and Class and Sub-Class Members are "consumers" within the
 27 meaning of California Civil Code § 1761(d) because they purchased their Class
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1 Vehicles for personal, family or household use.

2 83. By failing to disclose and concealing the defective nature of the
3 battery systems from Plaintiffs and prospective Class and Sub-Class Members,
4 Defendant violated California Civil Code § 1770(a), as they represented that the
5 Class Vehicles had characteristics and benefits that they do not have, and
6 represented that the Class Vehicles and their battery systems were of a particular
7 standard, quality, or grade when they were of another. *See* Cal. Civ. Code
8 §§ 1770(a)(5) and (7).

9 84. Defendant violated section 1770(a)(9) of the CLRA by advertising
10 the vehicles with the intent not to sell the vehicles as advertised.

11 85. Defendant's unfair and deceptive acts or practices occurred
12 repeatedly in Defendant's trade or business, were capable of deceiving a
13 substantial portion of the purchasing public, and imposed a serious safety risk on
14 the public.

15 86. Defendant knew that the Class Vehicles and their batteries suffered
16 from an inherent defect, were defectively designed or manufactured, would fail
17 prematurely, and were not suitable for their intended use.

18 87. Defendant was under a duty to Klee and the Class and Sub-Class
19 Members to disclose the defective nature of the battery systems because:

- 20 (a) Defendant was in a superior position to know the true state of
21 facts about the safety defect in the Class Vehicles' battery
22 systems;
- 23 (b) Plaintiff Klee and the Class and Sub-Class Members could not
24 reasonably have been expected to learn or discover that their
25 battery systems had a dangerous safety defect until
26 manifestation or failure;
- 27 (c) Defendant made partial disclosures about the quality of the
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1 Class Vehicles without revealing the defective nature of the
2 Class Vehicles and their battery systems; and

3 (d) Defendant knew that Plaintiff Klee and the Class and Sub-
4 Class and Sub-Class Members could not reasonably have
5 been expected to learn or discover the safety defect.

6 88. In failing to disclose the defective nature of the Class Vehicles and
7 their batteries, Defendant knowingly and intentionally concealed material facts
8 and breached its duty not to do so.

9 89. In representing that its vehicles would achieve an up to 100 mile
10 driving range without disclosing that its advertised ranges were only achievable
11 by charging the battery in a damaging, capacity-reducing manner that is against
12 Nissan's own recommendations, Defendant knowingly and intentionally
13 affirmatively misrepresented material facts to Plaintiff Klee and Class and Sub-
14 Class Members and breached its duty not to do so.

15 90. The facts concealed or not disclosed by Defendant to Plaintiff Klee
16 and the Class and Sub-Class Members are material in that a reasonable consumer
17 would consider them important in deciding whether to purchase a Class Vehicles
18 or pay a lesser price. Had Plaintiff Klee and other Class and Sub-Class Members
19 known that the Class Vehicles would exhibit heat related battery damage and
20 consequential loss of battery capacity and driving range due to the thermal
21 management defect, they would not have purchased the Class Vehicles or would
22 have paid less for them. Had Plaintiff Klee and Class and Sub-Class Members
23 known that Nissan's advertised driving ranges were based on a 100% charge,
24 and that to mitigate capacity loss, they would need to limit charges to 80%, they
25 would not have purchased the Class Vehicles or would have paid less for them.

26 91. Plaintiff Klee relied on Defendant's misrepresentations and
27 omissions. Plaintiff Klee and the Class and Sub-Class Members are reasonable
28

1 consumers who do not expect their driving ranges and battery capacities to
2 precipitously drop due to a thermal management defect. This is the reasonable
3 and objective consumer expectation relating to contemporary mass production
4 vehicles.

5 92. As a result of Defendant's conduct, Plaintiff Klee and Class and
6 Sub-Class Members have been harmed and have suffered actual damages in that
7 the Class Vehicles have experienced and will continue to experience heat related
8 battery damage and consequential loss of battery capacity and driving range due
9 to the defect herein alleged.

10 93. As a result of Defendant's conduct, Plaintiff Klee and Class and
11 Sub-Class Members were harmed and suffered actual damages as a result of
12 Defendant's misrepresentations and omissions with regard to vehicle range in
13 that they purchased vehicles which do not perform as advertised.

14 94. As a direct and proximate result of Defendant's unfair or deceptive
15 acts or practices, Plaintiff Klee and Class and Sub-Class Members suffered and
16 will continue to suffer actual damages.

17 95. Plaintiff Klee and the Class are entitled to equitable relief.

18 96. Plaintiff Klee provided Defendant with notice of its alleged
19 violations of the CLRA pursuant to California Civil Code § 1782(a).

20 **SECOND CAUSE OF ACTION**

21 **(Violation of California Business & Professions Code § 17200, *et seq.***

22 **By Plaintiff Klee**

23 **On Behalf of the Nationwide Class and California Sub-Class)**

24 97. Plaintiffs hereby incorporate by reference the allegations contained
25 in the preceding paragraphs of this Complaint.

26 98. Plaintiff Klee brings this cause of action on behalf of themselves
27 and on behalf of all Nationwide Class Members and California Sub-Class
28

Members.

99. California Business & Professions Code § 17200 prohibits acts of “unfair competition,” including any “unlawful, unfair or fraudulent business act or practice” and “unfair, deceptive, untrue or misleading advertising.”

100. Plaintiff Klee and the Class and Sub-Class Members are reasonable consumers who do not expect their vehicles to exhibit heat related battery damage and consequential loss of battery capacity and driving range due to the defect herein alleged.

101. Plaintiff Klee and the Class and Sub-Class Members are reasonable consumers who do not expect Nissan to base its advertised driving ranges on a fully charged battery without disclosing that Class and Sub-Class Members would need to avoid charging the battery beyond 80% capacity to mitigate long term battery capacity loss.

102. Defendant knew the Class Vehicles and their battery systems suffered from inherent defects, were defectively designed or manufactured, would fail prematurely, and were not suitable for their intended use.

103. In failing to disclose the thermal management defect, Defendant knowingly and intentionally concealed material facts and breached its duty not to do so.

104. In representing that its vehicles would achieve an up to 100 mile driving range without disclosing that its advertised ranges were only achievable by charging the battery in a damaging, capacity-reducing manner that is against Nissan’s own recommendations, Defendant has knowingly and intentionally affirmatively misrepresented material facts and breached its duty not to do so.

105. Defendant was under a duty to Plaintiff Klee and the Class and Sub-Class Members to disclose the defective nature of the Class Vehicles and their battery systems:

- 1 (a) Defendant was in a superior position to know the true state of
- 2 facts about the safety defect in the Class Vehicles' battery
- 3 systems;
- 4 (b) Defendant made partial disclosures about the quality of the
- 5 Class Vehicles without revealing the defective nature of the
- 6 Class Vehicles and their battery systems; and
- 7 (c) Defendant actively concealed the defective nature of the Class
- 8 Vehicles and their battery systems from Plaintiff Klee and the
- 9 Class.

10 106. Had Plaintiff Klee and other Class and Sub-Class Members known
11 that the Class Vehicles would exhibit heat related battery damage and
12 consequential loss of battery capacity and driving range due to the defect herein
13 alleged, they would not have purchased the Class Vehicles or would have paid
14 less for them.

15 107. Plaintiff Klee relied on Defendant's misrepresentations and
16 omissions. Had Plaintiff Klee and Class and Sub-Class Members known that
17 Nissan's advertised driving ranges were based on a 100% charge, but that to
18 mitigate capacity loss, they would need to limit charges to 80%, they would not
19 have purchased the Class Vehicles or would have paid less for them.

20 108. Defendant continued to conceal the defective nature of the Class
21 Vehicles and their battery systems even after Class and Sub-Class Members
22 began to report problems. Indeed, Defendant continues to cover up and conceal
23 the true nature of the problem.

24 109. By its conduct, Defendant has engaged in unfair competition and
25 unlawful, unfair, and fraudulent business practices.

26 110. Defendant's unfair or deceptive acts or practices occurred
27 repeatedly in Defendant's trade or business, and were capable of deceiving a
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1 substantial portion of the purchasing public.

2 111. Defendant's conduct was likely to deceive a reasonable consumer.

3 112. Defendant's conduct was unlawful in that, among other things, it
4 violated the California Consumer Legal Remedies Act.

5 113. As a direct and proximate result of Defendant's unfair and deceptive
6 practices, Plaintiff Klee and the Class have suffered and will continue to suffer
7 actual damages.

8 114. Defendant has been unjustly enriched and should be required to
9 make restitution to Plaintiff Klee and the Class and Sub-Class pursuant to §§
10 17203 and 17204 of the Business & Professions Code.

11 **THIRD CAUSE OF ACTION**

12 **(Breach of Implied Warranty Pursuant to**

13 **Song-Beverly Consumer Warranty Act,**

14 **California Civil Code §§ 1792 and 1791.1, et seq.**

15 **By Plaintiff Klee On Behalf of the California Sub-Class)**

16 115. Plaintiffs hereby incorporate by reference the allegations contained
17 in the preceding paragraphs of this Complaint.

18 116. Plaintiff Klee brings this cause of action against Defendant on
19 behalf of himself and on behalf of the members of the California Sub-Class.

20 117. Defendant was at all relevant times the manufacturer, distributor,
21 warrantor, and/or seller of the Class Vehicles. Defendant knew or had reason to
22 know of the specific use for which the Class Vehicles were purchased.

23 118. Defendant provided Plaintiff Klee and California Sub-Class
24 Members with an implied warranty that the Class Vehicles and any parts thereof
25 are merchantable and fit for the ordinary purposes for which they were sold.
26 However, the Class Vehicles are not fit for their ordinary purpose of providing
27 reasonably reliable and safe transportation because, *inter alia*, the Class Vehicles
28

1 and their battery systems suffered from an inherent defect at the time of sale and
2 thereafter are not fit for their particular purpose of providing safe and reliable
3 transportation.

4 119. Defendant impliedly warranted that the Class Vehicles were of
5 merchantable quality and fit for such use. This implied warranty included,
6 among other things: (i) a warranty that the Class Vehicles and their battery
7 systems were manufactured, supplied, distributed, and/or sold by Nissan were
8 safe and reliable for providing transportation; and (ii) a warranty that the Class
9 Vehicles and their battery systems would be fit for their intended use while the
10 Class Vehicles were being operated.

11 120. Contrary to the applicable implied warranties, the Class Vehicles
12 and their battery systems at the time of sale and thereafter were not fit for their
13 ordinary and intended purpose of providing Plaintiff Klee and the California
14 Sub-Class Members with reliable, durable, and safe transportation. Instead, the
15 Class Vehicles are defective, including but not limited to the defective design of
16 their battery systems.

17 121. Defendant's actions, as complained of herein, breached the implied
18 warranty that the Class Vehicles were of merchantable quality and fit for such
19 use in violation of California Civil Code §§ 1792 and 1791.1.

20 **FOURTH CAUSE OF ACTION**

21 **(Breach of Implied Warranty Pursuant to Magnuson-Moss Warranty Act,**
22 **15 U.S.C. §§ 2301 *et seq.*, by Plaintiffs Klee and Wallak on Behalf of the**
23 **Nationwide Class)**

24 122. Plaintiffs incorporate by reference each proceeding and succeeding
25 paragraph as applicable as though fully set forth at length herein.

26 123. Plaintiffs and the other Nationwide Class members are "consumers"
27 within the meaning of the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301(3).
28

1 124. Defendant is “suppliers” and “warrantors” within the meaning of 15
2 U.S.C. § 2301(4)-(5).

3 125. The Class Vehicles are “consumer products” within the meaning of
4 15 U.S.C. § 2301(1).

5 126. Defendant impliedly warranted that the Class Vehicles were of
6 merchantable quality and fit for such use. This implied warranty included,
7 among other things: (i) a warranty that the Class Vehicles and their battery
8 systems were manufactured, supplied, distributed, and/or sold by Nissan were
9 safe and reliable for providing transportation; and (ii) a warranty that the Class
10 Vehicles and their battery systems would be fit for their intended use while the
11 Class Vehicles were being operated.

12 127. Contrary to the applicable implied warranties, the Class Vehicles
13 and their battery systems at the time of sale and thereafter were not fit for their
14 ordinary and intended purpose of providing Plaintiff Klee and the Class
15 Members with reliable, durable, and safe transportation. Instead, the Class
16 Vehicles are defective, including but not limited to the defective design of their
17 battery systems.

18 128. The amount in controversy of the Plaintiffs’ individual claims meets
19 or exceeds the sum or value of \$25. In addition, the amount in controversy
20 meets or exceeds the sum or value of \$50,000 (exclusive of interests and costs)
21 computed on the basis of all claims to be determined in this suit.

22 129. Defendant has been afforded a reasonable opportunity to cure its
23 breach of implied warranty, including when Class Members brought their
24 vehicles in for diagnoses and repair of the battery system.

FIFTH CAUSE OF ACTION

(Breach of the Implied Warranty of Merchantability by Plaintiffs Klee and Wallak on Behalf of the Nationwide Class)

130. Plaintiffs incorporate by reference each proceeding and succeeding paragraph as applicable as though fully set forth at length herein.

131. Defendant is a “merchant” as defined under the Uniform Commercial Code (“UCC”) as adopted in California and nationally.

132. The Class Vehicles are “goods” as defined under the UCC.

133. Defendant impliedly warranted that the Class Vehicles were of a merchantable quality.

134. Defendant breached the implied warranty of merchantability, as the Class Vehicles were not of a merchantable quality at the time of sale and thereafter due to the thermal management defect and the associated problems caused by this defect. Specifically, the thermal management defect can cause severe and premature loss of driving range, battery capacity and battery life.

135. As a direct and proximate result of the breach of said warranties, Plaintiffs and Class Members were injured and are entitled to relief.

136. Defendant’s warranty limitation, if any, is unenforceable because they knowingly sold a defective product without informing consumers about the defect and actively concealed the defect from Class Members in order to allow the applicable warranty period to run.

137. The time limits contained in Defendant’s warranty period were also unconscionable and inadequate to protect Plaintiffs and Class Members. Among other things, Plaintiffs and Class Members had no meaningful choice in determining these time limitations, the terms of which unreasonably favored Defendant. A gross disparity in bargaining power existed between Defendant and Class Members, and Defendant knew or should have known that the Class

1 Vehicles were defective at the time of sale and that the batteries would fail well
2 before their useful lives.

3 138. Plaintiffs and Class Members have complied with all obligations
4 under the warranty, or otherwise have been excused from performance of said
5 obligations as a result of Defendant's conduct described herein.

6 **SIXTH CAUSE OF ACTION**

7 **(Negligent Misrepresentation**

8 **By Plaintiff Wallak On Behalf of the Arizona Class)**

9 139. Plaintiffs incorporate by reference each proceeding and succeeding
10 paragraph as applicable as though fully set forth at length herein.

11 140. Defendant provided false and/or incorrect information to Plaintiff
12 Wallak and the members of the Arizona Class about the range and the lack of a
13 thermal management defect in the Class Vehicles at the time of sale.

14 141. Also at the time of sale, Defendant omitted and/or failed to disclose
15 material information to Plaintiff Wallak and the members of the Arizona Class
16 about the range and the lack of a thermal management defect in the Class
17 Vehicles.

18 142. Defendant intended that Plaintiff Wallak and the members of the
19 Arizona Class rely on these misrepresentations and/or omissions.

20 143. Defendant failed to exercise reasonable care in
21 obtaining and communicating these misrepresentations and/or
22 omissions.

23 144. Plaintiff Wallak and the members of the Arizona Class reasonable
24 relied on Defendant's material misrepresentations and/or omissions.

25 145. As a direct and proximate result of Defendant's misrepresentations
26 and/or omissions, Plaintiff Wallak and Class Members were injured.

27 146. Wallak and the Class were unaware of these misrepresentations and
28

1 reasonably could not have discovered them when they purchased their
2 automobiles from Nissan.

3 **SEVENTH CAUSE OF ACTION**
4 **(Violation of the Arizona Consumer Fraud Act,**
5 **Ariz. Rev. Stat. §§ 44-1521 *et seq.***

6 **By Plaintiff Wallak On Behalf of as to the Arizona Class Only)**

7 147. Plaintiffs hereby incorporate by reference the allegations contained
8 in the preceding paragraphs of this complaint.

9 148. Defendant knew that the Class Vehicles and their batteries suffered
10 from an inherent defect, were defectively designed or manufactured, would fail
11 prematurely, and were not suitable for their intended use.

12 149. In representing that its vehicles would achieve an up to 100 mile
13 driving range without disclosing that its advertised ranges were only achievable
14 by charging the battery in a damaging, capacity-reducing manner that is against
15 Nissan's own recommendations, Defendant knowingly and intentionally
16 misrepresented and omitted material facts and breached its duty not to do so.

17 150. Plaintiff Wallak and Class Members reasonably relied on
18 Defendant's material misrepresentations and omissions in its advertisements of
19 the Class Vehicles and in the purchase of the Class Vehicles.

20 151. Nissan's use of deception, false promises, misrepresentations and
21 material omissions in connection with the sale and advertisement of its services,
22 violates the Arizona Consumer Fraud Act, Ariz. Rev. Stat. § 44-1522(A).

23 152. Had Plaintiff Wallak and other Class Members known that the Class
24 Vehicles would exhibit heat related battery damage and consequential loss of
25 battery capacity and driving range due to the defect herein alleged, they would
26 not have purchased the Class Vehicles or would have paid less for them.

27 153. Had Plaintiff Wallak and Class Members known that Nissan's
28

1 advertised driving ranges were based on a 100% charge, but that to mitigate
2 capacity loss, they would need to limit charges to 80%, they would not have
3 purchased the Class Vehicles or would have paid less for them.

4 154. Plaintiff Wallak and the Class suffered injury in fact to a legally
5 protected interest. As a result of Defendant's conduct, Plaintiff Wallak and
6 Class Members were harmed and suffered actual damages in that the Class
7 Vehicles experienced and will continue to experience heat related battery
8 damage and consequential loss of battery capacity and driving range due to the
9 thermal management defect. Had Plaintiff Wallak and other Class Members
10 known of the thermal management defect, they would not have purchased or
11 leased the Class Vehicles or would have paid less for them.

12 155. As a result of Defendant's conduct, Plaintiff Wallak and Class
13 Members were harmed and suffered actual damages as a result of Defendant's
14 misrepresentations and omissions with regard to vehicle range because they
15 purchased vehicles which do not perform as advertised.

16 156. As a direct and proximate result of Defendant's unfair or deceptive
17 acts or practices, Plaintiff Wallak and Class Members suffered and will continue
18 to suffer actual damages.

19 **RELIEF REQUESTED**

20 Plaintiffs, on behalf of themselves and Class Members request the Court to
21 enter judgment against Defendant, as follows:

- 22 (a) An order certifying the proposed Classes and Sub-Classes,
23 designating Plaintiffs as named representative of the Class,
24 and designating the undersigned as Class Counsel;
- 25 (b) On behalf of the Nationwide Class and California Sub-Class,
26 an order enjoining Nissan from selling the Leaf with the
27 misleading information; enjoining Nissan from
28

1 misrepresenting the mileage range of the Nissan Leaf and
2 compelling Nissan to issue corrective disclosures; compelling
3 Nissan to remove and replace Plaintiffs and Class Members'
4 battery systems with a suitable alternative product;
5 compelling Nissan to provide class members with a new
6 battery for the Leaf that does not contain the defects alleged
7 herein; and/or compelling Nissan to reform its Leaf battery
8 warranty, in a manner deemed to be appropriate by the Court,
9 to cover the loss of battery capacity under warranty as alleged
10 herein and to notify all class members that such warranty has
11 been reformed.

- 12 (c) On behalf of the Arizona Class, damages, including all
13 monies paid by Plaintiff and Class Members for any repairs
14 that had to be made and all monies attributable to diminution
15 in value of the Class Vehicles;
- 16 (d) An award of pre-judgment and post-judgment interest, as
17 provided by law;
- 18 (e) Leave to amend the Complaint to conform to the evidence
19 produced at trial;
- 20 (f) An award of attorneys' fees and costs, as allowed by law,
21 including an award of attorneys' fees and costs pursuant to
22 California Code of Civil Procedure § 1021.5, the Consumer
23 Legal Remedies Act, and the Song Beverly Consumer
24 Warranty Act, and Arizona statutes; and
- 25 (g) Such other relief as may be appropriate under the
26 circumstances.
- 27
28

DEMAND FOR JURY TRIAL

Pursuant to Federal Rule of Civil Procedure 38(b), Plaintiffs demand a trial by jury of any and all issues in this action so triable of right.

Dated: December 14, 2012

Respectfully submitted,
Capstone Law APC

By: /s/ Jordan L. Lurie

Jordan L. Lurie
Tarek H. Zohdy

Attorneys for Plaintiffs
Humberto Daniel Klee and David Wallak

CERTIFICATE OF SERVICE

UNITED STATES DISTRICT COURT)
) SS
 CENTRAL DISTRICT OF CALIFORNIA)

I am employed in the State of California, County of Los Angeles. I am over the age of 18 and not a party to the within suit; my business address is 1840 Century Park East, Suite 450, Los Angeles, California 90067.

On **December 14, 2012**, I served the documents described as: 1) **FIRST AMENDED CLASS ACTION COMPLAINT** on the interested parties in this action by sending on the interested parties in this action by sending [] the original [or] [✓] a true copy thereof [✓] to interested parties as follows [or] [✓]] as stated on the attached service list:

☒ **BY MAIL (ENCLOSED IN A SEALED ENVELOPE):** I deposited the envelope(s) for mailing in the ordinary course of business at Los Angeles, California. I am "readily familiar" with this firm's practice of collection and processing correspondence for mailing. Under that practice, sealed envelopes are deposited with the U.S. Postal Service that same day in the ordinary course of business with postage thereon fully prepaid at Los Angeles, California.

☐ **BY E-MAIL:** I hereby certify that this document was served from Los Angeles, California, by e-mail delivery on the parties listed herein at their most recent known e-mail address or e-mail of record in this action.

☐ **BY FAX:** I hereby certify that this document was served from Los Angeles, California, by facsimile delivery on the parties listed herein at their most recent fax number of record in this action.

☐ **BY PERSONAL SERVICE:** I caused to be delivered by messenger such envelope(s) by hand to the office of the addressee(s).

☐ **BY OVERNIGHT DELIVERY:** I am "readily familiar" with this firm's practice of collection and processing correspondence for overnight delivery. Under that practice, overnight packages are enclosed in a sealed envelope with a packing slip attached thereto fully prepaid. The packages are picked up by the carrier at our offices or delivered by our office to a designated collection site.

☒ **(FEDERAL)** I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this **December 14, 2012**, at Los Angeles, California.

Arvin Ratanavongse

Type or Print Name

Signature

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